have found otherwise when debating the question of common intention.

The jury were left only three possible verdicts, namely, murder, culpable homicide not amounting to murder or not guilty. In the result, the jury not being satisfied to find for either extreme, were left only with the intermediate verdict, which they duly returned. Had they been given the further option of finding the appellants guilty of voluntarily causing grievous hurt by dangerous weapons, an offence under section 326 of the Penal Code, it seems to us that, had the fight been presented with equal regard to the evidence for and against each side, the verdict might well have been for conviction under section 326 instead of section 304 of the Penal Code.

We therefore set aside the conviction under section 304 and substitute therefor a conviction under section 326 of the Penal Code in respect of the first three appellants, whose involvement in the fight was admitted. They are each sentenced to 3 years' imprisonment.

As to the fourth appellant, his defence was an *alibi*, supported by his employer, whose evidence was not shaken in cross-examination. The learned judge said that it was "possible" for him to have left the rubber estate to participate in the fight and then return in time to be observed continuing his work. With respect we do not think this direction was adequate. To a jury composed of laymen, summoned to jury service for the first time, an earlier direction in general terms to be satisfied as to this accused's guilt beyond reasonable doubt would hardly render it superfluous to distinguish between a possibility and a probability so likely that the fact might safely be taken for granted. They needed an express reminder that it was not enough to hold that he was guilty merely because of the bare possibility: the jury should have been further directed that "they must be *satisfied* that this defence was unsound before they convicted the appellant": see *R.* v. *Finch*.[1]

All that was alleged against him was his mere presence. In his case, particularly, evidence of his sharing the common intention was an even more crucial issue which the jury should have been expressly reminded to consider. For these reasons, we would quash the conviction of the fourth appellant.

*Order accordingly.*

---

## B. H. OON & ORS. v. THE GOVERNMENT OF THE STATE OF PENANG & ORS.

[F.C. (Azmi L.P., Suffian & Ali F.JJ.) February 9, 1970]
[Penang — Federal Court Civil Appeal No. X.23 of 1969]

*Land Laws — Land formed by alluvial deposits from the sea — Ownership of — Doctrine of accretion — Onus of proof — Issue of temporary occupation licence to owner of adjoining land — Whether owner estopped from claiming land — Licensee estopped only during the continuance of licence — Evidence Ordinance, 1950.*

In this case the appellants asked for a declaration that they were the owners of a piece of land adjoining their land which piece of land they alleged had been formed by slow and imperceptible accretion by alluvial deposits from the sea. The respondents admitted that a strip of dry land above the high water mark had been formed but made no admission as to the manner in which the alluvion was formed. They also raised in their defence the fact that one of the appellants had obtained a temporary occupation licence relating to the piece of land. The appellants were however no longer in possession by virtue of the temporary occupation licence at the time they brought the action.

**Held,** allowing the appeal: (1) assuming the onus of proof was on the plaintiffs/appellants in this case they had discharged their burden of showing that the alluvion had been formed gradually and imperceptibly;

(2) as the appellants had ceased to be licensees at the time when they brought the action, they were not estopped from questioning the title of the first respondent.

*Cases referred to:-*

(1) *Musselburgh Magistrates* v. *Musselburgh Real Estate Co.* [1904] Sc.L.R. 247, 252.

(2) *Dukhimoni Dasi* v. *Tulsi Charan* (1912) 13 I.C. 512.

(3) *Attorney-General* v. *Chambers*, *Attorney-General* v. *Rees* (1859) 4 De G.M. & J. 55; 45 E.R. 22.

(5) *Tadman* v. *Henman* [1893] 2 Q.B. 168.

(6) *Terunnanse* v. *Terunnanse* [1968] 2 W.L.R. 1125.

(7) *Rex* v. *Yarborough* 3 B. & C. 91; 107 E.R. 668.

(8) *Gifford* v. *Lord Yarborough* 5 Bing 163; 130 E.R. 1023.

(9) *Hull and Selby Railway* 5 M. & W. 327, 332; 151 E.R. 139, 140, 141.

(10) *Lopez* v. *Muddum Mohun Thakoor* 13 Moo. Ind. App. 467, 473; 20 E.R. 625, 627.

(11) *Rex* v. *Yarborough* 1 Dow & Clark 178; 6 E.R. 491.

(12) *Attorney-General* v. *Reeve* (1884-85) 1 T.L.R. 675, 678.

(13) *Rex* v. *Yarborough* 2 Bligh N.S. P.e. 147; 4 E.R. 1087, 1091.

(14) *Attorney-General of Southern Nigeria* v. *John Holt & Co. (Liverpool) Ltd.* [1915] A.C. 599, 612.

(15) *Brighton & Hove General Gas Co.* v. *Hove Bungalows Ltd.* [1924] 1 Ch. 372, 392.

(16) *Secretary of State for India in Council* v. *Foucar & Co. Ltd.* (1934) 50 T.L.R. 241, 243; 61 I.A. 28.

FEDERAL COURT.

*G. Starforth Hill* (*Dr. Ahmad Ibrahim* and *Oh Teik Aun* with him) for the appellants.

*Ajaib Singh* (Senior Federal Counsel) for the 1st respondent.

*V. L. Kandan* for the 2nd respondent.

*Cur. Adv. Vult.*

**Azmi L.P.:** This is an appeal against the judgment of the High Court at George Town, Penang, dismissing the plaintiffs' claim for the following declarations:

(1) (a) a declaration that the line of the medium high tide of the sea between the ordinary spring and neap tides from time to time constitutes the westerly boundary of Lot 275 (3) and 275 (1).

(b) a declaration that the first plaintiff is entitled to the fee simple absolute in possession of that part of the alluvion which lies along the westerly extremity of the said two lots and above the line of the medium high tide of the sea between ordinary spring and neap tides.

(c) in the alternative a declaration that the first plaintiff as the owner in fee simple in possession of the said two lots is entitled to free and uninterrupted access to the sea over every part of such part of the alluvion from every part of the said two lots.

(d) in the further alternative a declaration that as against the first and second defendants the first plaintiff is entitled to possession of that part of the alluvion which lies along the westerly extremity of the said two lots and above the line of the medium high tide of the sea between ordinary spring and neap tides.

(e) a mandatory injunction for the removal of the said fence and the said brick building erected on and any or whatever construction or constitution on Lot 808.

(f) vacant possession of all that part of Lot 808 which adjoins the said two lots.

(g) *mesne* profits from about the year 1958 until delivery of possession of all the alluvion which adjoins the said two lots.

(h) damages.

First plaintiff was the owner of lot 275(3) but first plaintiff and the other three plaintiffs are owners of lot 275(1).

The first defendant was the Government of the State of Penang and the second defendant was a body corporate incorporated by statute under the Electricity Ordinance 1949.

The said two lots are parts of a land originally alienated to a person named Forbes Scott Brown by Queen Victoria described in the grant

"as being situated in the division of Bagan Bahroo in the District of Telok Ayer Tawar in Province Wellesley bounded and measuring as follows:—

East by East India Co. and Boontah Loosoo's grounds 4,935 feet.

West by sea beach 4,067 feet.

North by road 1,904 feet.

South by Fakir and Che Mohamed's land 896 feet, agreeably to the plan indorsed thereon certified under the hand of Ian Moniet, Land Surveyor, estimated to contain an area of 94 square acres 3 sq. roods, 11 square poles together with appertenances."

It is not necessary to refer to the various conveyances through which the plaintiffs finally became the owners of the said lots. It was the plaintiffs' case that since the date of the grant in 1852 a strip of dry land hereinafter referred to as the alluvion comprising an area of about 4 acres, has been formed by the action of the sea and now lies above the high water mark of ordinary tides along the westerly extremity of the said lots 275(1) and 275(3). They also alleged that the alluvion had increased gradually, slowly and imperceptibly and naturally, through the years and is still increasing in like manner.

The plaintiffs also alleged that they and their predecessors in title have for onwards 60 years planted and cultivated coconut trees on the alluvion and are and were at all material times together in possession thereof until they were wrongfully ousted from a part thereof by the defendants.

The plaintiffs contended that the line of medium high tide of the sea between the ordinary spring and neap tides from time to time constituted the westerly boundary of their said lands and that accordingly the plaintiffs were entitled to the fee simple absolute in possession of that part of the alluvion lying along the westerly extremity of lot 275(1) and that the first plaintiff was similarly entitled to that part of the alluvion lying along the westerly extremity of lot 275(3).

The first defendant in its defence admitted that a strip of dry land above the high water mark had been formed as alleged but made no admission as to the manner in which such alluvion was formed. It denied that the plaintiffs were ever in possession of or entitled to in fee simple in respect of the alluvion. Further it maintained

(a) that the land originally granted by the indenture of 1852 was of a specific area and about 94 a. 3 r. 11 p.,

(b) that the westerly boundary of the said land as set out in the said indenture was fixed and determined and not removable,

(c) that the ownership of the said two lots did not give the plaintiffs any right over the alluvion,

(d) that the alluvion was the property of the first defendant,

(e) that the plaintiffs having on their own accord and volition applied for temporary occupation licences (or T.O.L.) over the alluvion were estopped from denying the first defendant's title,

(f) that the lease granted to the second defendant by the Governor of Penang was valid.

In its counter-claim it asked for an order removing certain fences constructed by the first plaintiff and damages for trespass.

The second defendant's case was substantially similar to that of the first defendant.

The learned judge dismissed the claims.

First he came to the view that the English doctrine of accretion is applicable to this case. The law as to accretion is set out by *Halsbury's* Laws of England 3rd Edn. Vol. 39 page 560 as follows:

"Where tidal water recedes gradually and imperceptibly from the land, or land by alluvion or dereliction is added to the dry land or foreshore, so that it becomes situate above the high water mark of ordinary tides or above the low water mark, it belongs, if above the high water mark, to the owner of the dry land to which it is added, and, if above the low-water mark to the owner of the foreshore."

The learned judge then went on to discuss the question of burden of proof and came to the conclusion that it is for the plaintiffs to prove their case.

From the evidence it would appear that first plaintiff has been living since 1940 on her own land described as lot 271(1) which is near to lots 275(3) and 275(1). The learned judge referred to the evidence of the first plaintiff that in the two lots under dispute there was no fencing on the seaward side when she purchased them but there were houses built on the alluvion, two of which were occupied by the former owners. There were also other houses on the alluvion but she put fencing on the said two lots subsequently and enclosed the area right to the sea during the emergency period some time in 1952. The learned judge also referred to the fact that the plaintiffs were then in possession of a temporary occupation licence in respect of the alluvion. He was not satisfied that the plaintiffs had proved that the previous owners had been in possession of the alluvion adjoining the two lots in question. He was also not satisfied that the plaintiffs had produced suffi-

cient evidence to establish that the alluvion had been caused gradually and imperceptibly, though he agreed that such accretion began a long time ago and that it was clearly indicated in the maps or plans published after the survey carried out in December 1924. He also came to the view that the word "sea-beach" is not the same as the word "sea" or "sea-shore" under the authority of the judgment of McDonald L.J.C. in *Musselburgh Magistrates* v. *Musselburgh Real Estate Co.*[1] and therefore the term "sea-beach" connotes the permanent boundary with the result the doctrine of accretion would not apply. Then he referred to the question of possession and he came to the conclusion that he must also dismiss the plaintiffs' claim on this ground because the evidence was rather meagre.

On the question of estoppel he upheld the defence's contention under the second limb of section 116 of the Evidence Ordinance that the plaintiffs were estopped from denying the first defendant's title by the fact that they had applied and obtained temporary occupation licences for the two said lots, on the authority of the judgment in the case of *Dukhimoni Dasi* v. *Tulsi Charan*.[2]

Before us it was urgued first, that the learned judge was wrong in holding that the burden of proof was on the plaintiffs to prove that the accretion in land had been gradual and imperceptible on the authority of the judgment of the Lord Chancellor in the *Attorney-General* v. *Chambers*, *Attorney-General* v. *Rees*,[3] I have gone through that case very carefully and I am afraid I am unable to find anything in it which states that the burden is always on the Crown in a dispute of that kind that alluvion was caused suddenly. I am inclined to agree with the trial judge's view that in this instant case the burden is on the plaintiffs to show that the alluvion had been caused gradually and imperceptibly.

But, however, I have come to a different conclusion as to the question whether the plaintiffs have discharged their burden that the alluvion had been formed gradually and imperceptibly. It would appear to me that the learned judge dismissed the plaintiffs' contention on this question on the ground that there is no evidence as to whether the original accretion was sudden or gradual though he had accepted the first plaintiff's evidence that the alluvion had increased since 1938 and that it had increased gradually and imperceptibly. On this question it is to be remembered that the defendants had merely in their pleadings denied the plaintiffs' allegation that the alluvion had been caused gradually and imperceptibly, and called upon the plaintiffs to prove it. However, since it cannot be disputed by the defendants that the alluvion since 1938 had been caused gradually and imperceptibly, it would be in my view, a fair inference of fact that it had been probably formed before 1938 in like manner. It is also a fair inference that had it been caused by some violent act of nature or man the first defendant, being the Government of the State, would have known and suggested so. In the circumstances, I would therefore say the plaintiffs have discharged their burden and the trial judge should have come to the conclusion that the alluvion had been caused slowly, gradually and imperceptibly since the grant was made to Mr. Brown.

On the evidence before him the learned judge rejected the plaintiffs' contention that they did not enter into possession of the alluvion by virtue of the temporary occupation licences as they were already in possession. The first plaintiff gave evidence as to the circumstances under which she said the licences were issued. According to her a clerk from the Land Office at Butterworth suggested to her that she apply for a temporary occupation licence and that unless she did that someone else might apply for it and then she would have someone squat in front of her and her coconut trees might be cut down. He also suggested to her that if she continued taking out the temporary occupation licence (which are issued annually) and continued to look after the land she could later on apply for a grant. In other words according to her, she applied for a temporary occupation licence, not because the land belonged to the Government but merely to prevent Government from giving permission to other people to squat on it. In my view the finding made by the learned judge on this evidence should not be disturbed.

The learned judge further found that the plaintiffs went into occupation of the alluvion by fencing it in 1952 after they had obtained the licence. Therefore, as licensees they could not under the second limb of section 116 of the Evidence Ordinance deny that the first defendant had title to the possession of the land in question when the licences were given to them to enter and on the authority of the Indian case of *Dukhimoni Dasi* v. *Tulsi Charan, supra*, they cannot deny the first defendant's title though there was no relationship of licensor or licensee subsisting between them during the period sued for. Jenkins C.J. in *Dukhimoni Dasi's* case did not appear to give reasons for the decision of the court, because in reference to section 116 of the Evidence Act, he merely said this: -

"Having regard to section 116 of the Evidence Act the defendant cannot be permitted to deny that the plaintiff had a title to the possession of the land at a time when the licence was given to enter into possession."

But N.R. Chatterjee J. however, in the course of the argument of the appeal said:

"But in section 116 of the Evidence Act, there is no such expression as 'during the continuance of the licence' as there is in the same section in the case of a tenant."

The headnote of the report in the Indian Cases reads as follows: -

"A licensee cannot be permitted under section 116 of the Evidence Act to deny that the licensor had a title to the possession of the property at the time when the licence was given to him to enter, though there was no relationship of licensor and licensee subsisting between the parties during the period sued for."

The above summary was cited in *Sarkar* on Evidence (11th Ed. page 1123).

The learned judge in the instant case has apparently accepted the headnote of the report as laying down correctly the judgment of the Indian case.

Let me now turn to the corresponding law in England.

The authorities which settled the English law are conveniently collected in *Spencer Bower & Turner* on "Estoppel by Representation" 2nd Ed. (1966) para-

graph 173 at page 170. I need only cite the following sentences taken from that paragraph: -

"Generally speaking, not only any person who accepts a lease from another, but anyone who is let into possession or occupation by, or 'comes under' another, including a licensee, lodger, caretaker, servant and the like, by so doing acknowledges the title of that other to grant the right or licence by virtue of which he occupies the premises, and is accordingly estopped, so long as he remains in occupation, from controverting such title. But it must appear that the transaction is one of demise and nothing else and the party sought to be estopped must have his grant or receive his possession from the party raising the estoppel."

Charles J. in *Tadman* v. *Henman*[5] fully recognized the absence of any distinction between the case of a licensee and a tenant. In his judgment in that case at page 171 he said this: -

"But upon a comparison of that case (*Doe d Johnson* v. *Baytup* 3 A. & H. 188) with that of *Doe d Knight* v. *Smythe* (4 A. H. & H. 347), I have come to the conclusion that its principle has no application to the case before me. All that it decides is that a defendant in ejectment who has got into possession by the plaintiff's licence cannot turn round upon the plaintiff and say, 'I am in possession; if you want to turn me out, show your title'; but if he wishes to dispute the plaintiff's title to the land, must first give up possession to the plaintiff, from whom he obtained it. That case concedes that a tenant or licensee may always dispute his lessor's or licensor's title, provided he first gives up possession of the premises. But here, Mrs. Tadman had no possession of the premises to give up."

In other words in England estoppel inures only during the continuance of the licence. In the instant case the plaintiffs at the time when they bought this action were no longer in possession by virtue of the temporary occupation licence. In this connection my attention was drawn since the hearing of this appeal to the case and the judgment of the Privy Council in the Ceylonese case of *Terunnanse* v. *Terunnanse*.[6]

Their Lordships of the Privy Council had in that case occasion to consider the provision of section 116 of the Ceylonese Evidence Ordinance which in all respects corresponds to our own section 116. The question dealt by their Lordships in that case is different from that in the instant case but in my opinion, the following passage at page 1129 in their Lordships' judgment could be accepted as a general guidance to us when dealing with our Evidence Ordinance particularly with those provisions dealing with estoppel: -

"The respondent concedes that he was a licensee of the land in dispute. His argument against the estoppel rests, as will appear, upon a narrow interpretation of the Ordinance. Section 116 is one of three sections that compose chapter X of the Ordinance, which is headed Estoppel. This chapter is a very condensed version of the English common law on estoppel *in pais*. Their Lordships consider that it must be interpreted, and if necessary expanded, in the light of the common law. The Ordinance is one of a number which follow the Indian Evidence Act, 1872. This Act, as is well known, was drawn up by Sir James Stephen. In 1876 he reproduced it in substance for English lawyers in his Digest of the Law of Evidence. The object of the Digest was to supply a concise code and not an elaborate treatise and so principles are briefly stated; but in his introduction to the first edition Stephen said that it was 'intended to represent the existing law exactly as it stands.' Section 116 of the Ordinance corresponds with article 112 of the Digest. It is therefore in their Lordships' opinion legitimate, when applying section 116, consult and give effect to the English cases, even if they appear to go further than the language of the section; and specific authority for so doing is given by section 100 of the Ordinance which provides that whenever in a judicial proceeding a question of evidence arises not provided for by the Ordinance or by any other law in force in Ceylon, such question shall be determined in accordance with the English law of evidence for the time being."

I would, with respect, first adopt the words of their Lordships in reference to the present case and say that the learned High Court in India in the *Dukhimoni Dasi's* case had interpreted section 116 narrowly. We should therefore, as exhorted by their Lordships, consult and give effect to English cases, and in the circumstances I would come to the view that a licensee is estopped from controverting the title of his licensor only so long as he remains in occupation but not after he has given up possession.

In view of my finding that the alluvion had been formed gradually and imperceptibly since Mr. Brown was given the grant of the land, there should be declarations prayed for in paragraphs (a) and (b) of plaintiffs' claim. I would therefore allow the appeal with costs here and in the court below. The plaintiffs' deposit of $500 will be returned to them.

**Suffian F.J.:** I have had the advantage of reading my Lord President's judgment, and with respect I concur with his conclusion and reasons.

**Ali F.J.:** In an action commenced in the High Court, Penang the appellants sued the Government of the State of Penang for declarations, the purpose of which was to establish rights of ownership over a piece of land about 4 acres in area. The Central Electricity Board was a necessary party by reason of the fact that a portion of the said land was leased to them by the State Government. The appellants' claim is founded on what is known as the rule of accretion, a rule recognised as being part of the English common law. This rule governs the question of ownership of land formed by alluvial deposits from the sea. It is comprehensively discussed by Lord Hale, a great authority on the law of maritime increment, in his work *De Jure Maris et Brachiorum Ejusdem* (Hargrave Law Tract). It received judicial consideration in the leading case of *Rex* v. *Yarborough* [7] which went to the House of Lords under the name of *Gifford* v. *Lord Yarborough*.[8] The rule is peculiar not only to the conditions in England for it seems to have been applied to territories like Burma and some parts of Africa. In *Gifford* v. *Lord Yarborough, supra*, Lord Chief Justice Best said:

"All writers on the law of England agree in this: that as the King is lord of the sea that flows around our coasts, and also owner of all the land to which no individual has acquired a right by occupation and improvement, the soil that was once covered by the sea belongs to him.

But this right of the sovereign might, in particular places, or under circumstances, in all places near the sea, be transferred to certain of his subjects by law. A law giving such rights may be presumed from either a local or general custom, such custom being reasonable, and proved to have existed from time immemorial.

... We think there is a custom by which lands from which the sea is gradually and imperceptibly removed by the alluvion of soil, becomes the property of the person to whose land it is attached, although it has been the *fundus maris*, and as such the property of the King...."

The universal applicability of the doctrine was recognised in *Hull and Selby Railway*[9] by Lord Abinger C.B. who said:

"... The principle there established is not peculiar to this country, but obtains also in others, and is founded on the necessity which exists for some such rule of law, for the permanent protection and adjustment of property...."

In the Privy Council case of *Lopez* v. *Muddun Mohun Thakoor*[10] Lord Justice James said of the principle:

"This principle is one not merely of English law, not a principle peculiar to any system of municipal law, but it is a principle founded in universal law and justice; that is to say, that whoever has land, whatever it is, whatever may be the accident to which it has been exposed, whether it be a vineyard which is covered by lava or ashes from a volcano, or a field covered by the sea or by a river, the ground, the site, the property, remains in the original owner."

In the instant case the learned trial judge has said:

"The two Privy Council cases to which I have referred are sufficient authorities for the proposition that in the absence of local legislation to the contrary, and there is none in force in Penang, the English doctrine of accretion is applicable to this case. In my opinion it is also applicable under the provisions of section 3 (1) of the Civil Law Ordinance 1956, notwithstanding the provisions of section 6 of the same Ordinance."

It is not in doubt, therefore, that the rule applies to Penang. I wish only to add that there is nothing in the provisions of the Crown Lands Ordinance (S.S. Cap. 113) and the Crown Lands Encroachment Ordinance (S.S. Cap. 114), to suggest any intention to exclude this rule.

This rule of accretion, though explained or described in various ways in the relevant authorities cited, does not appear to have been formulated in any accepted form by the courts in England. In *Rex* v. *Yarborough*[11] the head note describes it in these terms:

"Lands formed slowly, gradually and imperceptibly, by alluvion on the sea-shore, belong, by general immemorial custom, to the owner of the adjoining lands, and not to the Crown."

In a passage from his work '*De Jure Maris*'. Lord Hale explains the rule in the following words:

"The increase *per alluvionem* is when the sea, by casting up sand and earth, doth by degrees increase the land, and shut itself out further than the ancient bounds went; and this is usual. The reason why this belongs to the Crown is because in truth the soil, where there is now dry land, was formerly part of the very *fundus maris*, and consequently belonged to the King. And indeed, if such alluvion be so insensible that it cannot be by any means found that the sea was there, *idem est non esse et non apparere;* the land thus increased belongs as a perquisite to the owner of the land adjacent."

In his judgment the learned trial judge also quoted a passage from *Blackstone* (Vol. 2 page 262) which explains the rule thus:

"As to lands gained from the sea, either by alluvion, by the washing up of sand and earth, so as in time to make *terra firma;* or by *dereliction*, as when the sea shrinks back below the usual water-mark; in these cases the law is held to be that if this gain be by little and little, by small and imperceptible degrees, it shall go to the owner of the land adjoining. For *de minimis non curat lex:* and, besides, these owners, being often losers by the breaking in of the sea, or at charges to keep it out, this possible gain is therefore a reciprocal consideration for such possible charge or loss. But, if the alluvion or dereliction be so sudden and considerable, in this case it belongs to the King; for, as the King is lord of the sea, and so owner of the soil while it is covered with water, it is but reasonable he should have the soil, when the water has left it dry."

In *Re Hull and Selby Railway, supra,* Alderson B. stated the rule in these words:

"... Suppose the Crown, being the owner of the foreshore — that is, the space between high and low water mark — grants the adjoining soil to an individual; and the water gradually recedes from the foreshore, no intermediate period of the change being perceptible; in that case the right of the grantee of the Crown would go forward with the change. On the other hand, if the sea gradually covered the land so granted, the Crown would be the gainer of the land. The principle laid down by Lord Hale, that the party who suffers the loss shall be entitled also to the benefit, governs and decides the question. That which cannot be perceived in its progress is taken to be as if it never had existed at all."

It seems clear from the words of Lord Hale and Blackstone that, theoretically speaking, the minute particles of earth and sands or accretions, as they are sometimes described, originally belong to the Crown because they come from the soil under the sea. Under the rule thus explained, land formed by the accumulations of these accretions, slow, and gradual and unnoticed by the human eyes, belongs to the owner of the adjoining land. The reason for it is amplified by the words of Alderson B. in the case just referred to as underlined. These words have been cited with approval by Lord Chelmsford in *Attorney-General* v. *Chambers*[3] and also in *Attorney-General* v. *Reevé*.[12] There is, therefore, a preponderance of authorities for the view that the manner of formation of alluvial land in order to attract the rule is a relevant matter for consideration. The first respondent, apparently aware of this, have taken up the point that in order to succeed in this claim the appellants must prove that the land they are claiming was formed in the manner stated in the rule. The point was taken up in paragraph 2 of the amended statement of defence which is averred in these words:

"With regard to paragraph 10 of the amended statement of claim, the first defendant admits that a strip of dry land above high water mark (hereinafter referred to as 'alluvion') has been formed along the western extremity of Lots 275 (1) and 275 (3), but makes no admission as to the manner in which such alluvion was formed."

There is in this paragraph a clear admission that the land claimed is alluvial land and that it is now lying alongside the western boundary of the appellants' lands. Quite clearly the State Government, the first respondent, knew that this land was alluvial land but was not in a position to say whether or not it was formed in the manner required by the rule. In the situation it was thought that in terms of the rule there was an onus on the appellants to prove that the land was formed slowly, gradually and imperceptibly. The learned trial judge holding that there was such an onus concluded in these words:

"... Quite clearly such accretion began a long time ago and it was clearly indicated in the maps or plans published after the survey carried out in December 1924, but there is no evidence as to whether the original accretion was sudden or gradual. I do not think therefore that the plaintiffs have proved their case as to accretion."

In my view as far as the owner of the adjoining land is concerned, it would be quite impossible for him to prove positively how the alluvial land was formed. This

is especially so in the present case where ownerships of the adjoining lands have changed hands from time to time since 1830. To require the appellants to prove the manner of formation in order to bring the rule of accretion into operation is to impose on them an intolerable burden. The manner of such formation must always be a matter of assumption. The word "imperceptible" in the rule as explained by Lord Hale and Blackstone and also in the cases already referred to would be meaningless if there is such a thing as an onus of proving imperceptible increases of accretions. On the other hand, if the State Government in this case have claimed ownership of the alluvial land on the ground that it was formed suddenly or perceptibly, there must, of course, be the evidence to prove this in order to exclude the rule of accretion. The Crown succeeded in *Attorney-General* v. *Reeve, supra,* because there was such evidence. Lord Coleridge in that case said:

"... On the contrary, the witnesses, who had the best means of observing, are able by marks and measures to indicate what was gained. This is clear from the evidence given by John Henderson, late chief officer of the Coastguard at Lowestoft, and James Swan, who has lived there all his life, and has for the last 53 years been a harbour and gat pilot there. Henderson said that, shortly before the construction of the north pier there had been commenced, the beach above ordinary high-water mark immediately to the north of the pier began to advance, and the line of ordinary high-water mark could be plainly perceived from time to time as it went on; that when the wind was blowing strong from north-west to north, with a high tide, it was often visible from day to day; and that he had frequently noticed during the prevalence of such winds that the line of ordinary high-water mark receded some 10 or 12 feet in a single tide, leaving an accretion of sand and shingle many feet in depth over the high-water mark of the previous tide. Swan's evidence, too, was to the effect that the progress of the beach and receding of the line of ordinary high-water mark were visible from month to month and at times even from day to day. This having been proved by the evidence, we accordingly give judgment for the Crown."

The distinction drawn by Best C.J. in *Rex* v. *Yarborough*[13] would assist in resolving the present difficulty. Best C.J. said:

"There is a great difference between land formed by alluvion and derelict land. Land formed by alluvion must become useful soil by degrees, too slow to be perceived. What is deposited by one tide will not be so transient as to be removed by the next. An embankment of a sufficient consistency and height to keep out the sea must be formed imperceptibly. The sea frequently retires suddenly, and leaves a large space of land uncovered. When the authorities relative to these subjects are considered, this difference will be found to make a material difference in the law which applies to derelict lands, and to such as are formed by alluvion."

However, even if there was any requirement that the appellants had to discharge an onus of proof the evidence in the case seems to have clearly established that as early as 1924 accretions have been noticed and that these have accumulated to such an extent that when the action was instituted by the appellants, the alluvion formed has grown to a size of about 4 acres in area. The reasonable inference could only be that over a period of about 38 years the alluvion has slowly, gradually and imperceptibly increased. With respect, therefore, I am unable to agree with the conclusion of the learned trial judge that the appellants' claim would fail on this ground.

The Penang State Government have also pleaded two matters in their pleadings to resist the appellants' claim. They are:

(a) that the original land comprising the two lots 275 (1) and 275 (3) was of a specific area; and

(b) that its western boundary was fixed and determined and not removable.

But the authorities seem to be against the contention that the rule does not apply. As to (a), it is true that the original land as granted by Indenture 4276 was for an estimated area of 93 square acres 4 square roods and 11 square poles. That this does not exclude the rule seems clear from the decision in the Privy Council case of *Attorney-General of Southern Nigeria* v. *John Holt & Co. (Liverpool) Ltd.*[14] in which Lord Shaw of Dunfermline said:

"Upon the other hand, if accretions had been formed in the course of nature by the silting up of sand, gravel, and the like, and these accretions had been of the gradual character to be afterwards referred to, they would have been added to the land, notwithstanding the measurement in square yards or feet which the title contained."

"The reason of this is not far to seek, and it is substantially to be found in that general convenience and security which lie at the root of the entire doctrine of accretion. To suppose that lands which, although of specific measurement in the title deeds, were *de facto* fronted and bounded by the sea were to be in the situation that their frontage to the sea was to disappear by the action of nature to the effect of setting up a strip of land (it might be yards, feet, or inches) between the receded foreshore and the actual measured boundary of the adjoining lands, which strip was to be the property of the Crown, and was to have the effect of converting land so held into inland property, would be followed by grotesque and well-nigh impossible results, and violate the doctrine which is founded upon the general security of landholders and upon the general advantage."

As regards (b), except *Attorney-General* v. *Chambers, supra,* and possibly *Attorney-General* v. *Reeve, supra,* the weight of authorities would seem to favour the view that regardless of any clear line of demarcation the rule would apply. The following words in the passage from Lord Hale's treatise '*De Jure Maris*', already quoted, have given rise to a conflict of views:

"... And indeed, if such alluvion be so insensible that it cannot be by any means found that the sea was there, *idem est non esse et non apparere;* the land thus increased belongs as a perquisite to the owner of the land adjacent."

Dealing with this particular passage Lord Tenterden (Abbott C.J.) in *Rex* v. *Yarborough*[7] said:

"... And considering the word 'imperceptible' in this issue, as connected with the words 'slow and gradual,' we think it must be understood as expressive only of the manner of the accretion, as the other words undoubtedly are, and as meaning imperceptible in its progress, not imperceptible after a long lapse of time."

But in *Attorney-General* v. *Chambers, supra* Lord Chelmsford taking a different view said at page 28:

"... Lord Hale here clearly limits the law of gradual accretions to the cases where the boundaries of the seashore and adjoining land are so undistinguishable that it is impossible to discover the slow and gradual changes which are from time to time accruing, and when at the end of a long period it is evident that there has been a considerable gain from the shore, yet the exact amount of it, from the want of some mark of the original boundary line, cannot be determined. But where the limits are clear and defined, and the exact

space between these limits and the new high water line can be clearly shewn, although from day to day or even from week to week the progress of the accretion is not discernible, why should a rule be applied which is grounded upon a reason which has no existence in the particular case?"

In 1923 Romer J. referring to this conflict of views, in *Brighton and Hove General Gas Co.* v. *Hove Bungalows Ltd.*[15] said:

"But the attention of Lord Chelmsford had not been called to the fact that the case of *Rex* v. *Lord Yarborough* had been taken to the House of Lords under the name of *Gifford* v. *Lord Yarborough* and had there been affirmed. In that case the land gradually left dry by the action of the sea abutted upon land of which the former boundary was well-known and readily ascertainable, for that boundary was a sea wall. It was nevertheless held that the general law of accretion applied. The observations of Lord Tenterden therefore were not merely dicta, but went to the root of his decision, and that decision having been affirmed in the House of Lords, I am, I apprehend, bound by the statement of law enunciated by him, and am not at liberty to give effect to the views expressed by Lord Chelmsford in the passage that I have read, even if those views commended themselves to my mind."

Following Romer J., Sir George Lowndes, delivering the judgment in the Privy Council case of *Secretary of State for India in Council* v. *Foucar & Co. Ltd.*[16] said:

"In their Lordships' opinion, these cases were rightly decided, and they think that the general principle of accretion applies even where the former boundaries of the land on the water front were known or capable of ascertainment. On the assumption, therefore, that this was the position by reference to the plans in evidence in the present case, they are unable to hold that this excludes the application of the doctrine."

The learned trial judge in this case has not considered this contention by the respondent but it seems clear from his judgment that upon the authorities cited the contention would in any case fail.

One of the main questions considered by the trial court relates to estoppel. This was raised by the Penang State Government on the ground that the appellants have on their own accord and volition applied for temporary occupation licences over the alluvion. The contention was that the appellants are estopped in terms of section 116 of the Evidence Ordinance from denying the Penang State Government's title thereto. The learned trial judge has concluded that this defence was fatal to the appellants' case. Section 116 reads as follows:

"116. No tenant of immovable property, or person claiming through such tenant, shall during the continuance of the tenancy be permitted to deny that the landlord of such tenant had at the beginning of the tenancy a title to such immovable property; and no person who came upon any immovable property by the licence of the person in possession thereof shall be permitted to deny that such person had a title to such possession at the time when such licence was given."

In this case we are only concerned with the second limb of the section. So far as estoppel was based on the issues of temporary occupation licences by the State Government to the appellants the fact that the appellants had been so issued with these licences since 1949 was indisputable. They obtained these licences to enable them to collect fruits from the alluvion. They never physically lived on the alluvion. After 1957 or 1958 they were, according to the evidence, no longer issued with the licences. The land officer giving evidence for the defence has testified to the effect that as far as he was able to make out from the official records no temporary occupation licences were issued to the appellants after 1958. The lease granted by the Penang State Government to the Central Electricity Board, the second respondent, clearly suggests that the board had gone into occupation of part of the alluvion described as lot 808, sometime in December, 1957. At all events it was abundantly clear that when this action was instituted in 1962, the appellants were no longer in occupation or possession of the alluvion. This, in my judgment, is sufficient ground for saying that section 116 cannot apply. In some textbooks on evidence, the estoppel in section 116 is treated as an estoppel by contract. It operates to prevent a tenant or a licensee from denying title because under a contract with a landlord or with a licensor there is implied an acknowledgment by such tenant or licensee of the landlord's or licensor's title. This acknowledgment of title is presumed to have led the landlord or the licensor to act to his detriment by giving up possession to the tenant or the licensee who, therefore, as long as he is still in possession, is estopped from denying the landlord's or licensor's title. This rule of estoppel also applies in England. A short passage from *Foa's* General Law of Landlord and Tenant, 8th Edition, would seem to support the view that section 116 of the Evidence Ordinance cannot apply to this case. At page 471 of *Foa's* book, the passage reads:

"So long as he retains possession, a tenant cannot dispute the title of the person who gave him that possession."

On the facts of the present case alone, I would respectfully disagree with the conclusion of the learned trial judge that the appellants' claim can be defeated by estoppel. I would also go further to say this. So far as the rule of estoppel in section 116 is a rule of evidence, it is clearly designed to protect the landlord or the licensor from being defeated in his claim for possession of immovable property merely on the ground that he has no title or if he has title it is defective. In the ordinary way, section 116 is sometimes invoked by the plaintiff in an action for possession for non-payment of rents or for such similar breaches of contract. In the present case, we have the position in reverse where a defendant in an action is pleading estoppel. While this may not in itself be objectionable in law, it does appear somewhat odd. It is odd because we are not here concerned with a claim of possession. We are concerned with a claim for a declaration as to the right of ownership over an alluvion. The appellants are not denying anybody's title because title has yet to be determined. It is true that they have on their own accord and volition applied for temporary occupation licences. But these licences, as we all know, are licences issued under statutory powers and are issued in respect of Crown lands to enable the licensee to make a limited use of such lands. The licence has to be applied for and, if granted, a certain prescribed fee is charged. A person applies for a temporary occupation licence simply because he recognises the authority of the Government over the Crown lands. Such recognition of Government authority cannot be placed on the same footing as an acknowledgment of title. In most cases the subjects are not in a position to know whether a particular piece of land is or is not

Crown land. In this country including the State of Penang titles to land can only be ascertained from the Register of Titles. Such lands are described as alienated lands, i.e. land alienated by the Crown. Crown lands are usually those which have not been alienated and are nowhere to be found on the Register of Titles. In that sense it would be a misuse of the English language to say that the appellants are denying the Government title to Crown land. The truth, as it seems to me, is that the appellants have applied for temporary occupation licence because that was the only way in which they could prevent the land from being given on a licence to some other persons. The first appellant may be a lawyer by profession but she could not be certain of her rights to the alluvion unless that is acknowledged by the State Government. From the exchanges of correspondence it would seem that since 1955, she had challenged the State Government's right to the alluvion. Her claim was disputed. It was only then that the appellants decided to come to the court for a declaration. Strictly speaking, therefore, the appellants are not in any way disputing title and there is, therefore, no ground for invoking section 116 against them. In many of the cases of alluvion cited to the court, only one seems to have been concerned with the question of estoppel. Although the facts giving rise to the plea of estoppel are not fully set out it would appear the court was not impressed by the defence contention. I am of course referring to the Privy Council case of *Secretary of State for India in Council* v. *Foucar & Co. Ltd.*[16] Sir George Lowndes, delivering the judgment of the Privy Council said:

"It only remains to deal with the suggestion of estoppel based on the fact that some of the earlier grantees acquiesced in fresh grants being made by the Government of lands which they might, on the basis of this judgment, have claimed for themselves as accretions. Their Lordships fail to understand how any case of estoppel can be sustained against the respondents. Nothing is known as to the circumstances under which these fresh grants were made. The grantees may not have desired the additional lands: they may even have regarded a new holder, settled between them and the chances of the river, as an additional security to their own holdings: they may have been, and probably were, altogether ignorant of their rights, or unwilling "to spend money in litigating with Government if they did know of them. But in any case the accretions were totally different from those now claimed by the respondents, and the non-claimer by them cannot, in their Lordships' opinion, have any adverse effect upon the rights now claimed by the respondents."

Therefore, for a number of reasons already stated I cannot agree with the trial court's finding that estoppel is fatal to the appellants' claim.

One minor question raised by the appellants in this appeal was the observation made by the learned trial judge in respect of the sale of Lot 275(1). His Lordship was of the view that this sale would, in any case, prevent the court from making a declaration of ownership in respect of the alluvion adjoining that land. I cannot foresee any difficulty in this for any such declaration, if made, would benefit the owner of the adjoining land, whoever he might be. It would, therefore, be beneficial to the purchaser of the lot unless reservation excluding the alluvion is made in the conveyance. Whether or not there is evidence of such a reservation would be a matter between the vendor and the purchaser. Until a dispute arises between them, I do not think it necessary for this court to consider it.

Up to now, so far as is necessary for the determination of this appeal, I have dealt with questions raised in the defence pleadings and have arrived at conclusions different from those of the trial court. In that context, I would, therefore, allow this appeal to the extent that the appellants are entitled to declarations in terms of paragraph 20(1)(b) and paragraph 20(1)(d) of the further amended statement of claim.

The appellants have also asked for other declarations, one of which is in these terms:

"that the line of the medium high tide of the sea between the ordinary spring and neap tides from time to time constitutes the westerly boundary of the two lots under consideration."

(Paragraph 20(1)(a) and paragraph 20(2)(a)) In so asking they are apparently of the view that for the rule of accretions to operate there must be established that the western boundary of their lands, at the time of the original grant in 1852, was in fact the sea or the sea-shore; or to put in the words of Alderson B. in *Re Hull and Selby Railway, supra*, "the space between the high and low water mark". A considerable amount of documentary evidence and lengthy arguments were addressed to the trial court on this question. Volumes of documentary evidence in this case relate to conveyances and maps, some of which, if not all, were for the purpose of showing that lots 275(1) and 275(3) owned by the appellants form part of a larger area of land originally granted in 1852 and that the western boundary of the two lots mentioned are the same as that described for the larger area in the original Indenture 4276. Whether or not the western boundary was or was not the sea or the sea-shore is undoubtedly a question of fact which could only be established by evidence. The appellants have relied on the evidence of an experienced surveyor who, upon examining the plans and survey maps, has expressed the view that the western boundary was in fact a natural feature boundary, which means the sea. Another qualified Government surveyor was called by the Penang State Government and he was inclined to the view that the western boundary was a straight-line boundary, i.e. a boundary having permanent markers on the ground, thereby suggesting a clear line of demarkation separating the appellants' lands from the sea. Either way, the evidence was far from being conclusive and the learned trial judge probably had this in mind when he said:

"Whatever view I take of the evidence given by the surveyors, it is the construction of the words used in the original indenture which is more important, and in this connection it is the meaning of the term 'sea beach' which must decide the issue."

Apart from the surveyors' opinion and the evidence of the survey maps or plans and Government *Gazette* notifications in which the word "sea" is used to describe the boundary, no other witness was called or was available to testify to the fact that the western boundary was the sea. In terms stated, the fact to be proved has not, therefore, been proved conclusively by evidence. But be established by construing the words of description

"sea beach" in the original Indenture 4276. The learned trial judge, construing these words to mean something quite different from the sea, concluded as follows:

"In view of the authorities which I have cited the conclusions at which I have arrived are as follows. If in a conveyance the land is described as being bounded on the west by the 'sea shore' or the 'sea', it would mean that the grantor never contemplated that he had remaining after executing such a deed any land or rights in lands to the west of the lands conveyed, so that any land added to the sea-shore by the gradual and imperceptible receding of the sea would be held to be an accretion subsequent to the deed and accordingly to be land which becomes the property of those claiming under the grantee. If the term 'sea beach' is used as the boundary on the west of the land such boundary would be a permanent boundary so that any accretion to the land would be Crown property...."

As can be expected the construction of the words could only lead the court to the conclusion as to the grantor's intention in using those words. It did not, however, prove that the western boundary was in fact the sea. The words of the judgment would appear to suggest that the learned trial judge was inclined to the view taken by Lord Chelmsford in *Attorney-General* v. *Chambers, supra*, which, as I have earlier stated was not followed in *Brighton & Hove General Gas Co.* v. *Hove Bungalows, supra;* and *Secretary of State for India in Council* v. *Foucar & Co. Ltd., supra.* In construing the words "sea beach" as he did, the learned trial judge found support mainly from the words of Macdonald L.J.C. and Lord Trayner in *Musselburgh Magistrates* v. *Musselburgh Real Estates Co.*[1] In that case the words "sea beach" fell to be construed clearly because the court was considering the effect of a statutory provision in relation to an area over which the Harbour Commissioners claimed to have the statutory right of control. The bone of contention was that the commissioners have no such right as the area belongs to the owner of adjacent land who relied on the words "sea beach" used in his title deed to support his contention. When this decision of the Court of Appeal was before the House of Lords the line of approach adopted was completely different as the House was of the view that the issue turned solely on the construction of the statutory provision under consideration. The meaning of the words "sea beach" was not at all discussed by the House. In the instant case, the trial court was not concerned with the construction of a statutory provision. Nor was it concerned with the intention of the grantor of the original land. The appellants wanted to show that the western boundary was in fact the sea or sea-shore. The simple truth is that they could not prove that fact by evidence. Construing the words of the indenture was not going to help them in any way for the grantor's intention what the western boundary should be might very well be different from what it in fact was. In any case, I fail to understand why it should be necessary to prove this fact or to put it differently why the appellants should want a declaration that the western boundary was the sea. The rule of accretion, as I understand it, following decisions in *Rex* v. *Yarborough, supra, Brighton & Hove General Gas Co.* v. *Hove Bungalows, supra* and *Secretary of State for India in Council* v. *Foucar & Co. Ltd., supra,* does not seem to require such fact to be proved. Accretions must come from the sea and alluvion formed, therefore, can only attach itself to land having a seaward boundary, that is land abutting or fronting the sea. If it does not so attach the owner of the adjoining land would have no ground to say that the alluvion has been added to his land. If it does, then quite clearly the seaward boundary must have been so close to the sea that it was possible for it to be reached by accretions washed up by the sea. In such a case the rule would operate regardless of any clear line of demarcation such as permanent boundary marks to separate the subject's land from the sea. On this view of the question I do not propose to discuss the authorities relating to the meaning of the words "sea beach".

Another point raised by the appellants relates to possessory title or adverse possession. I would regard this as an alternative basis on which ownership to the alluvion is claimed. As between subject and subject it is not unusual for a claim on this basis to arise. It would arise when a person in long possession claims better title to land as against the legal owner. (See *Megarry and Wade* on the Law of Real Property, 3rd Edition, pages 997-1000). Long and adverse possession pre-supposes lawful possession. So far as this is an action between the Crown and the subject the land in dispute must necessarily be assumed to be Crown land. The appellants' possession of the Crown land would be unlawful unless otherwise licenced. Their prior possession of the alluvion was, therefore, unlawful. So was the prior possession of their predecessors in title. I have mentioned this to illustrate the fallacy of the contention that an alluvion can be claimed on the ground of adverse possession or possessory title. I realise, of course, that the claim was rejected by the trial court on a different ground. Even if the learned trial judge was wrong in rejecting the evidence of the first appellant relating to prior possession he was right in rejecting the claim. So far as the claim involves accretions or alluvion the appellants' case must stand or fail by this rule of accretions. Fortunately for them the rule must, in the circumstances of this case, operate in their favour.

Before concluding, I must say a few words on the respondents' counter-claim which does not appear to have been considered by the trial court. The respondents having succeeded on the main claim have not thought it necessary to ask for an order, either from the trial court or from this court. I should be content to assume that it was abandoned. At any rate, I would have dismissed it.

I would allow this appeal with costs here and below.

*Appeal allowed.*

Solicitors: *Lim, Lim & Oon; Shearn, Delamore & Co.*